REMEDIES FOR UNDOCUMENTED WORKERS FOLLOWING A RETALIATORY DISCHARGE*

The prevailing judicial perspective holds that undocumented workers are "employees" under the National Labor Relations Act and are protected against retaliatory constructive discharges by employers. However, ambiguity surrounds the remedies available to undocumented workers who have been subject to such discharges. In Sure-Tan, Inc. v. NLRB, *the Supreme Court held that the affected undocumented workers could not receive backpay and reinstatement remedies until they were legally present in the United States. Nonetheless, subsequent judicial and administrative decisions have limited the* Sure-Tan *holding. This Comment proposes a model for providing remedies to undocumented workers in light of the interaction between* Sure-Tan, *the post-*Sure-Tan *cases, and the recent passage of the Immigration Reform and Control Act of 1986.*

INTRODUCTION: UNDOCUMENTED WORKERS IN THE UNITED STATES LABOR MARKET

Undocumented immigration continues to be a national concern, particularly as it affects the United States labor market.[1] Since World War II, undocumented labor, predominantly from Mexico, has been noted for its concentration in agriculture as temporary migrant labor. It gradually has shifted to urban locations as a more

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1. Immigration Control and Legalization Amendments Act of 1986, H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1 (1986) (to accompany H.R. 3810, 99th Cong., 2d Sess. (1986)); HOUSE OF REPRESENTATIVES COMM. ON THE JUDICIARY, 99TH CONG., 2D SESS., SERIAL 7, IMPACT OF ILLEGAL IMMIGRATION AND BACKGROUND ON LEGALIZATION (Congressional Research Service 1985) [hereinafter Congressional Research Service]; *General Accounting Office Briefing Report to Congressional Requesters, Illegal Aliens: Limited Research Suggests Illegal Aliens May Displace Native Workers*, GAO/PEMD-86-9BR (1986).

permanent work force in service, construction, and manufacturing.[2] A lively debate has emerged as to whether these workers replace United States workers in unwanted jobs, protect complementary jobs in the primary labor market, and create other jobs for United States workers by their expenditures in the local economy, or whether these workers adversely affect domestic workers by depressing wages and taking wanted jobs.[3]

A central concern in the labor market debate is the extent to which employers exploit this presumably docile work force and how such exploitation can, in turn, affect domestic workers.[4] Employers can segment the available labor market by preferring undocumented workers over citizen and legal-resident workers in their hiring and firing decisions. The adverse impact on domestic workers may be viewed in both economic and violation-of-rights terms.

From an economic perspective, employers may justify their preference for undocumented workers on the grounds that they work "harder" and "cheaper" than domestic workers.[5] Domestic workers who compete for the same types of jobs as undocumented workers would benefit by the removal of undocumented workers from the domestic labor market. Removal would restrict the employer's labor supply and create an upward pressure on wages and working conditions.[6]

The benefit to domestic workers is the exact opposite from a violation-of-rights perspective. Domestic workers can benefit by having undocumented workers protected in the same way they are. Employers often retaliate against undocumented workers who choose to exercise their labor rights, by reporting them to the Immigration and Naturalization Service (INS).[7] Yet, employers would have no advantage in reporting undocumented workers if they were penalized by the National Labor Relations Board (NLRB) and by the courts

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2. H. CROSS & J. SANDOS, ACROSS THE BORDER: RURAL DEVELOPMENT IN MEXICO AND RECENT MIGRATION TO THE UNITED STATES 54-55 (1981).

3. *Id.* at 84-95; *see also* Congressional Research Service, *supra* note 1, at 8-22; SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY, UNITED STATES IMMIGRATION POLICY AND THE NATIONAL INTEREST 506-16 (1981) (staff report supplement).

4. P. MARTIN, ILLEGAL IMMIGRATION AND THE COLONIZATION OF THE AMERICAN LABOR MARKET (Center for Immigration Studies Paper 1 1986); J. NALVEN & C. FREDERICKSON, THE EMPLOYER'S VIEW: IS THERE A *Need* FOR A GUEST-WORKER PROGRAM? (Community Research Assocs. 1982). *Contra* Cornelius & Fernandez-Kelly, Impacts of Mexican Immigration upon Labor Markets and Industrial Organization in California: An Exploratory Study (unpublished essay for the Center for U.S.-Mexican Studies 1984).

5. Congressional Research Service, *supra* note 1, at 15-22.

6. However, in cases in which the affected jobs respond to a global production line, the removal of undocumented workers may result in the jobs being exported, and may result in a pyrrhic victory for those seeking to protect the domestic labor market.

7. Bracamonte, *The National Labor Relations Act and Undocumented Workers: The De-Alienation of American Labor*, 21 SAN DIEGO L. REV. 45-48 (1983).

for unfair labor practices against undocumented workers.[8] Thus, undocumented workers would not be dissuaded from participating in a unionization effort out of a fear of being reported by employers and deported by the INS. The added participation of undocumented workers would bolster unionization efforts.

These two perspectives on how best to protect domestic labor from undocumented workers are addressed separately under the Immigration and Nationality Act (INA)[9] and the National Labor Relations Act (NLRA).[10] Under the INA, alien workers are excluded from the United States unless there are insufficient numbers of domestic workers who are willing, able, qualified, and available to work in jobs advertised by employers, and unless these aliens "will not adversely affect the wages and working conditions of the workers in the United States similarly employed."[11] These provisions incorporate the economic perspective of domestic labor by seeking to control the labor supply. However, prior to the passage of the Immigration Reform and Control Act of 1986 (IRCA),[12] the immigration laws did not directly speak to the employment of aliens who completely flouted the process of lawful admission. Under the INA, as it was passed in 1952 and existed through 1986, it was a felony to willfully import, transport, or harbor an undocumented alien, but *not* to employ undocumented aliens.[13] Thus, the economic perspective of protecting domestic workers was not fully incorporated in pre-IRCA immigration law.

Although employers encountered no sanctions by hiring undocu-

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8. Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, ch. 372, 29 U.S.C. § 151 (1982) [hereinafter NLRA], forbid employer retaliation for concerted activity of domestic labor. NLRA § 8(a)(1),(3), 29 U.S.C. § 158(e).

9. Immigration and Nationality Act, 8 U.S.C. §§ 1101-1525 (1982) [hereinafter INA].

10. 29 U.S.C. § 151 (1982).

11. INA § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INA excludes the following classes of aliens from admission into the United States:

> Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified . . . and available . . . to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.

12. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1987) [hereinafter IRCA].

13. INA § 274, 8 U.S.C. § 1324(a). Southwest agribusiness effectively lobbied Congress to exempt employers from sanctions, popularly referred to as the "Texas Proviso."

mented workers, they were effectively estopped under the NLRA from firing these same workers when the workers took advantage of the rights enjoyed by citizen and legal resident workers.[14] Thus, it has been argued that there was no "antinomy" between the INA and the NLRA; in fact, the two acts have been viewed as complementary.[15] Prior to 1986 the INA sought to exclude unneeded and unauthorized entrants to the labor market, while the NLRA sought to protect such workers — as all workers — once they became present in the labor market.

With the passage of IRCA in 1986, the *employment* of new undocumented workers is unlawful. From an economic perspective, the INA can now be viewed as far more aggressive in protecting domestic workers by reducing the presence of undocumented workers in the labor market. However, two implications may be drawn from the residual role of the NLRA. First, even though it still may be maintained that the NLRA complements the INA by the classification of undocumented workers who remain in the United States as "employees," the need for such protections should diminish with a corresponding reduction in the presence of undocumented workers in the labor market. Second, the reinstatement and backpay remedies under the NLRA are arguably truncated: reinstatement should be difficult to obtain because it is now illegal for the employers to employ undocumented workers. However, certain provisions in IRCA may permit reinstatement for undocumented workers who remain in the United States in "limbo" — those not eligible for legalization nor subject to the reporting requirements demanded of all *new* hires.

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14. Since 1944 courts have consistently included undocumented workers within the essential term "employee" under the NLRA. In Logan & Paxton, 55 N.L.R.B. 310, 315 n.12 (1944), the NLRB rejected any distinction between citizen and noncitizen: "The Act does not differentiate between citizens and non-citizens. In order to effectively carry out the purposes of the Act, we conclude that no distinction should be drawn on such a basis." *See also* Sure-Tan, Inc., 231 N.L.R.B. 138 (1977) (the NLRB regional director held that the undocumented workers employed by the company were entitled to vote in a union election); Amay's Bakery & Noodle Co., 227 N.L.R.B. 214 (1976) (the NLRB held that the employer's firing of undocumented workers prior to a union election was an unfair labor practice); Lawrence Rigging, Inc., 202 N.L.R.B. 1094 (1973) (the Administrative Law Judge was overruled by the NLRB on the exclusion of an undocumented worker from a union election); Azusa Citrus Ass'n, 65 N.L.R.B. 1136 (1946) (the union's objection to the participation of a Mexican national in an election was overruled by the NLRB). Two key court of appeals decisions in the late 1970's have reinforced the NLRB position that undocumented workers are "employees" under the terms of the Act: NLRB v. Sure-Tan, Inc., 583 F.2d 355 (7th Cir. 1978), and NLRB v. Apollo Tire Co., 604 F.2d 1180 (9th Cir. 1979). The language of the NLRA by which these decisions construe "employee" is found in 29 U.S.C. § 152(3) (1976).

15. *See* Bracamonte *supra* note 7, at 29, 50.

IMMIGRATION REFORM AND CONTROL ACT OF 1986

A significant element in IRCA is the inclusion of a one-time amnesty for undocumented persons who entered the United States before January 1, 1982.[16] IRCA does not provide for any mass deportation programs to eliminate the presence of undocumented workers in the United States — a scheme which could well engender xenophobic reactions to "foreign"-looking persons.[17] Instead, Congress opted to act through the labor market. While this conversion to legal status will reduce the number of undocumented persons in the United States, it will not eliminate them. IRCA further proposes to use prospective employer sanctions as a vehicle to demagnetize the domestic labor market for future entrants. However, the workers who came to the United States after January 1, 1982, and prior to the passage of IRCA, will be in a state of limbo: they will not be able to take advantage of the legalization program, and they probably will not be expelled because, if already working, they would not be subject to the prospective reporting system.

IRCA does not explicitly state what remedies should be available to these "grandfathered" undocumented workers if they are subjected to unfair labor practices. However, IRCA should be judged against its recognition of a period of transition and the balancing of competing rights and interests of employers and employees. The clearest statement on remedies is provided in the immediate predecessor to IRCA — House of Representatives bill 3810.[18] The bill provides relevant legislative history on what the Committee on the Judiciary would have intended employer sanctions to achieve during this transition period. Broadly stated, the Committee's intent was to leave intact existing "protections" for undocumented workers.[19]

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16. IRCA § 201(a), 100 Stat. 3394 (amending/adding INA § 245A(a)(2)).

17. The primary mechanisms of IRCA are defensive in nature, such as tightening up screening procedures to federal grant programs, requiring employers to check documents of new hires, and increasing deployment of Border Patrol agents for preventing entries without inspection. Moreover, the bill is sensitive to potential unfair immigration-related employment practices. It calls for the termination of employer sanctions if widespread discrimination against citizens, nationals, or eligible workers is discovered by the Comptroller General. IRCA § 101(a), 100 Stat. 3360 (amending/adding INA § 274A). Other observers who are solely result-oriented will argue that it is unimportant whether increased deportations are achieved by defensive or offensive enforcement mechanisms.

18. H.R. 3810, 99th Cong., 2d Sess. (1986).

19. Immigration Control and Legalization Amendments Act of 1986, H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 58:

> It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards,

Apparently, the Committee on the Judiciary expected the holding in *Sure-Tan, Inc. v. NLRB*[20] to survive impending legislative reforms. Given the debate that has since developed over the breadth of the *Sure-Tan* holding, it is unclear, in retrospect, how the Committee construed *Sure-Tan.* Specifically, what remedies did the Committee have in mind for undocumented workers who are entitled to be considered "employees" under the NLRA? A close review of *Sure-Tan* and the subsequent limiting opinions in the Ninth Circuit, the Arizona Court of Appeals, and the California Agricultural Labor Relations Board will provide a framework for understanding H.R. 3810, as well as clarify the interaction between this line of cases and IRCA.

SURE-TAN, INC. V. NLRB

Sure-Tan, Inc. v. NLRB involved the employees of two leather processing companies, most of whom were undocumented workers. These workers helped elect as their bargaining agent the Chicago Leather Workers Union, Local 431.[21] The employer objected to the election on the grounds that the majority of the workers was present in the United States illegally. The NLRB Acting Regional Director rejected the employer's claim that these workers were ineligible to vote and certified the election.[22] The employer then wrote to the INS, requesting a review of the alien status of certain employees.[23] All five of the employees that the INS checked acknowledged their unauthorized presence in the United States and accepted voluntary departure to Mexico on February 18, 1977.[24] The NLRB upheld the finding of the Administrative Law Judge (ALJ) of unfair labor practice, holding that the employer's notification of the INS constituted a

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> labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law. In particular, the employer sanctions provisions are not intened [sic] to limit in any way the scope of the term "employee" in Section 2(3) of the National Labor Relations Act (NLRA), as amended, or of the rights and protections stated in Sections 7 and 8 of that Act. As the Supreme Court observed in *Sure-Tan, Inc. v. NLRB*, application of the NLRA 'helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment.'

These employment-related protections are *not* those which have been implemented in IRCA. The unfair immigration-related employment practices enacted in IRCA speak to discrimination against individuals based on national origin or those intending citizenship — that is, the section protects civil, not labor rights. IRCA § 102(a), 100 Stat. 3374 (amending/adding INA § 274B(a)(1)).

20. 467 U.S. 883 (1984).
21. *Id.* at 886.
22. *Id.* at 887.
23. *Id.*
24. *Id.*

retaliatory constructive discharge.[25] The ALJ did not recommend a backpay award, concluding that these deported workers were unavailable for work. However, the ALJ did recommend reinstatement. The offer to these workers was to be kept open for six months.[26]

The Seventh Circuit upheld the Board's position, ordering, however, that the remedy be modified: the offer for reinstatement would be held open for four years and a minimum six-month backpay award would be made even though the discriminatees were unavailable for work; however, in order to claim their backpay award, the discriminatees would have to legally re-enter the United States.[27] The NLRB adopted the order directed by the Seventh Circuit.[28]

The Supreme Court upheld the liability finding, 7-2, but rejected the proposed remedy, 5-4, to award six months' backpay. The Court held that the six-month backpay award was based on "pure speculation and does not comport with the general reparative policies of the NLRA . . . [and is] not sufficiently tailored to the actual, compensable injuries suffered by the discharged employees."[29] While the Court held that the NLRA generally is not in conflict with the INA, it also noted that the INA could not be completely ignored by the NLRB and conditioned reinstatement on the deported employees' "legal readmittance to the United States."[30]

Sure-Tan, Inc. v. NLRB captures the twists of logic replayed in many and diverse forums concerning how best to resolve the undocumented worker issue: mass deportation schemes are not invoked; attempts are made to keep employers at arms length from undocumented workers; and the INS is expected to maintain the integrity of the national border. Justice O'Connor, writing for the majority, explained the *Sure-Tan* Court's decision as a "counterintuitive" reconciliation of the INA and the NLRA.[31] Justice Brennan, in his dissent, characterized the result as a "disturbing anomaly."[32] Justice

25. *Id.* at 888.
26. *Id.*
27. *Id.* at 890.
28. *Id.*
29. *Id.* at 901.
30. By conditioning the offers of reinstatement on the employees' legal reentry, a potential conflict with the INA is thus avoided. Similarly, in computing backpay, the employees must be deemed "unavailable" for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States.
Id. at 903.
31. *Id.* at 892.
32. *Id.* at 911 (Brennan, J., dissenting).

Brennan lamented the Court's simultaneous recognition that these workers are entitled to bring an unfair labor practice claim, while at the same time are stripped of effective remedies.[33] Justice O'Connor weighed the workings of immigration laws more heavily than these individual remedies.[34] The Court's majority is forging a practical, institutionalized solution to making both immigration and labor laws work in harmony.

In light of *Sure-Tan*, subsequent litigants and courts have come to different interpretations as to the significance of "availability for work." Did the Court mean that undocumented workers are by definition (because of their unlawful immigration status) legally unavailable for work and are therefore never eligible for backpay awards? Or did the Court narrowly refer *only* to those undocumented workers who were deported as not entitled to backpay awards until they can legally re-enter the United States, thus providing no incentive for illegal re-entry? Under the latter reading, undocumented workers who remain in the United States can be viewed as available for work and hence eligible for backpay awards. The latter reading is justified by the violation-of-rights perspective outlined earlier by removing the employer's incentive to undermine the assertion of protected NLRA employee rights. The cases discussed below will explore these interpretations of *Sure-Tan*.

POST-*Sure-Tan* DECISIONS

United States Ninth Circuit

Bevles Company, Inc. v. Teamsters Local 986[35]

Bevles, the employer, had received a letter from his attorney advising him that it was against California law to knowingly hire illegal aliens. Bevles proceeded to dismiss two of his employees after they failed to satisfy his questions regarding their lawful immigration status.[36] Teamsters Local 986 represented the dismissed employees and argued successfully before the arbitrator that Bevles lacked just cause. The arbitrator held that because Bevles was unable to show that he would have been subjected to criminal penalties in California for hiring undocumented workers, he violated the terms of the collective bargaining agreement. Bevles was ordered to reinstate both workers and give backpay to one of them.[37]

The Ninth Circuit held that the arbitrator's award was correct. The award did not violate public policy, since Congress had not

33. *Id.*
34. *Id.* at 893-94.
35. 791 F.2d 1391 (9th Cir. 1986), *petition for cert. filed* (U.S. Sept. 15, 1986).
36. *Id.* at 1392.
37. *Id.*

made the employment of undocumented workers a crime for either the undocumented worker or the employer.[38] Additionally, because there were no active state proscriptions, the arbitrator's award was not a manifest disregard of law.[39] The Court also reasoned that *Sure-Tan* did not announce any public policy sufficient to prohibit the arbitrator's award. First, the review of an arbitrator's reading of a collective bargaining agreement is more limited than a review of an NLRB decision. Second, the petitioners in *Sure-Tan* had already left the United States; thus the Supreme Court's holding was directed at discouraging illegal re-entry, thereby avoiding "a potential conflict with the INA."[40] However, the dissent in *Bevles* read the majority's holding to be in direct conflict with the Supreme Court in *Sure-Tan*.[41]

The *Felbro*[42] Decision

The impact of *Sure-Tan* confronted the Ninth Circuit again in *NLRB v. Felbro, Inc.*[43] Felbro, a California manufacturer, dismissed several workers and modified work practices during the election of Local 512 as the workers' bargaining agent in mid-1981. The ALJ determined that these dismissals were violations of sections 8(a)(1) and 8(a)(3) of the NLRA.[44] Five of the dismissed workers testified under assumed names, indicating thereby that they were undocumented workers.[45] During the period prior to the ALJ's hearing, the five undocumented workers remained in the United States and were in fact reinstated by Felbro.[46] The ALJ recommended the traditional remedies of backpay and reinstatement for those workers as well as

38. *Id.* at 1392-93. Further, California Labor Code section 2805, dealing with the knowing employment of illegal aliens, was correctly ignored since its status remains unclear. CAL. LAB. CODE § 2805 (West 1971 & Supp. 1987).

39. *Bevles*, 791 F.2d at 1393.

40. *Id.*

41. *Sure-Tan* unmistakably requires that the sanctions imposed by reason of the labor law be reconciled with the immigration laws. The arbitration award attempts no such reconciliation. It could have done so by providing that reinstatement and back pay were permissible only when [the] plaintiffs . . . became "lawfully entitled to be present and employed in the United States." The mere presence of [the plaintiffs] in the United States does not provide the "reconciliation" of which *Sure-Tan* spoke. *Id.* at 1394 (Sneed, J., dissenting) (citations omitted).

42. The court consolidated the case of Local 512, Warehouse & Office Workers' Union v. NLRB with NLRB v. Felbro, Inc.

43. 795 F.2d 705 (9th Cir. 1986).

44. *Id.* at 709.

45. *Id.* at 710.

46. *Id.* at 709.

retroactive enforcement of the collective bargaining agreement.[47] The undocumented status of these workers did not factor into the ALJ's decision concerning Felbro's unfair labor practices or the remedies awarded to these workers.[48]

The NLRB, however, modified the ALJ decision. The NLRB took note of *Sure-Tan*, which was decided subsequent to the ALJ's determination in *Felbro*, and conditioned the ALJ's remedy on the legal presence of these workers in the United States. The NLRB interpreted *Sure-Tan* "to mean that an undocumented alien worker would *never* be entitled to backpay, and required the compliance officer to determine the legality of each discriminatee's presence in the United States."[49]

The Ninth Circuit approved the NLRB's findings on Felbro's unfair labor practices, but held that the NLRB's conditioning of the backpay remedy was inconsistent with both the NLRA[50] and the INA;[51] it thus denied enforcement of this part of the NLRB order. The Ninth Circuit found *Felbro* to be significantly distinguishable from the facts in *Sure-Tan*,[52] and referred to its own precedent, *NLRB v. Apollo Tire Co.*[53] in affirming its recognition of "the right of backpay of undocumented discriminatees who are available for work in the United States."[54]

The NLRB petitioned for rehearing *en banc* from the Ninth Circuit, pointing to the dissent in both *Bevles* and *Felbro* as the correct reading of the *Sure-Tan* holding. Following Judge Beezer's dissent in *Felbro*, the NLRB asserted that the *Sure-Tan* Court "did not limit its holding to situations where the alien has been physically removed from the United States through deportation or voluntary departure."[55]

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47. *Id.* at 710.
48. *Id.* at 714.
49. *Id.* at 716 (emphasis in original).
50. *Id.* at 719.
51. *Id.*
52. *Sure-Tan* does not address the question whether an undocumented worker who *remains* in the United States, and who has *not* been the subject of any INS deportation proceedings, is barred from receiving backpay to remedy an NLRA violation . . . . [T]he thrust of [*Sure-Tan*] is directed at the speculative nature of the Board's remedy. Unlike the five *Sure-Tan* employees, the Felbro discriminatees' lost wages can be determined precisely . . . . The backpay owing here is thus "actual," not "speculative." Thus, *Sure-Tan* does not control the backpay award for the Felbro discriminatees. *Id.* at 717 (emphasis in original).
53. 604 F.2d 1180 (9th Cir. 1979).
54. 795 F.2d at 724.
55. Petition for Rehearing on behalf of the National Labor Relations Board at 5, (9th Cir. August 18, 1986), Local 512, Warehouse & Office Workers' Union v. NLRB, 795 F.2d 705, *reh'g denied*, CV 85-7355 (9th Cir. September 4, 1986), *and*, CV 85-7281 (9th Cir. October 3, 1986).

Arizona State Court

Arizona Farmworkers' Union v. Phoenix Vegetable Distributors[56]

The Arizona Farmworkers' Union (AFW) and six of its members brought an action against Phoenix Vegetable Distributors, alleging unfair labor practices in blacklisting these workers and in refusing to rehire them because of their union activities.[57] An injunction was granted by the superior court, ordering reinstatement. The Arizona Court of Appeals held that the superior court did not abuse its discretion in granting the injunction prior to a hearing by the Arizona Agricultural Employment Relations Board,[58] and that *Sure-Tan* did not control the instant case. The court argued:

- The NLRA exempted agricultural workers from its purview, as a result of which Arizona passed state labor laws to protect its farmworkers.[59]
- State law must actually conflict with federal law, not potentially conflict with it;[60] since there are no employer sanctions at present, the employer is not violating the INA by rehiring the undocumented workers.[61]
- The argument for implied preemption of state law can be justified if it is reasonable to infer that Congress left no room for states to supplement federal laws.[62] However, in *DeCanas v. Bica*,[63] the Supreme Court held that California's employer sanctions law was not necessarily preempted by the INA: Congress intended that the States be allowed, "to the extent consistent with federal law, [to] regulate the employment of illegal aliens."[64]
- According to *Sure-Tan*, one purpose of the INA is to deter illegal immigration, but the Court did not perceive a state reinstatement order as an obstacle to "deterring illegal immigration."[65]

The dissent in *Arizona Farmworkers'* argues that the Arizona court "is not empowered to review the United States Supreme Court's decision on the issue of what action conflicts with the policies underlying the Immigration and Naturalization [sic] Act."[66] Fur-

56. No. 1 CA-CIV 8199 (Ariz. Ct. App. July 10, 1986).
57. *Id.* at 1.
58. *Id.*
59. *Id.* at 7.
60. *Id.* at 9.
61. *Id.*
62. *Id.* at 7-8.
63. 424 U.S. 351 (1976).
64. *Arizona Farmworkers'*, No. 1 CA-CIV 8199, slip op. at 7 (quoting *DeCanas*, 424 U.S. at 36).
65. *Arizona Farmworkers'*, No. 1 CA-CIV 8199, slip op. at 10-11 "Neither a state court order of reinstatement nor a federal order of deportation undermines the authority of the other. Thus, an order of reinstatement would have no more than 'some purely speculative and indirect impact upon immigration.'" The court further held that "the [INA] does not preempt the authority of Arizona courts to order reinstatement of illegal aliens not entitled to work in the United States." *Id.*
66. *Id.* at 15.

ther, the dissenting judge noted that whether principles of comity or accomodation are invoked, the remedies extended to the undocumented workers were ruled invalid by the Supreme Court under the INA: "If these remedies are contrary to the [INA] so as to preclude utilization by another federal agency, the [NLRB], then *a fortiori*, under the supremacy clause, the [INA] would preclude the use of the same remedies by a state agency to enforce state law."[67]
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California Agricultural Labor Relations Board

Rigi Agricultural Services, Inc.[68]

Three undocumented employees at Rigi Agricultural Services, Inc. (Rigi), a northern California vineyard, were fired on February 5, 1982, and subsequently found by an Administrative Law Judge to have been dismissed for their union activities.[69] The California Agricultural Labor Relations Board (ALRB) ordered Rigi to reinstate these workers, who had not been deported by the INS, and give them backpay.[70] Rigi sought delay of the ALRB's order, pending the outcome of *Sure-Tan*. The ALRB denied Rigi's request because it did not find "*Sure-Tan* sufficiently related to the instant case to justify deviation from [its] usual practice of treating all agricultural employees alike, regardless of their immigration status."[71] Once the United States Supreme Court decided *Sure-Tan v. NLRB* on June 25, 1984, Rigi filed a motion with the ALRB to issue an interim decision.[72]

The ALRB noted that *Sure-Tan* could be distinguished from *Rigi* because, unlike the employees in *Rigi*, the *Sure-Tan* employees were deported to Mexico.[73] However, the Board preferred to follow a different line of analysis. The Board argued that the conditions imposed on the *Sure-Tan* employees "[did] not constitute applicable NLRA precedent under section 1148 of the [Agricultural Labor Relations Act]" (ALRA).[74] The ALRB decision offers a similar rationale to

67. *Id.* at 14. (Haire, J., concurring in part, dissenting in part).
68. 11 A.L.R.B. No. 27 (1985).
69. *Id.* at 3. Rigi stated that he dismissed the workers because they "ran from an agent of the United States Immigration & Naturalization Service ('INS') and [he] learned that the employees were undocumented aliens without the right to work in the United States." Appellant's Brief at 4, Rigi Agric. Servs., Inc. v. California Agric. Labor Relations Bd., No. 85-2145 (9th Cir. October 30, 1985).
70. *Rigi*, 11 A.L.R.B. No. 27, slip op. at 3.
71. *Id.* Rigi also petitioned the California Court of Appeal for a writ of review under section 1160.8 of the Agricultural Labor Relations Act, but was denied. Rigi pursued the issue to the California Supreme Court and was denied a hearing.
72. *Id.* at 4.
73. *Id.* at 7.
74. *Id.*

that set forth in *Arizona Farmworkers'*[75] as to why a state entity is not compelled to follow the NLRB precedent as set forth in *Sure-Tan.*

The ALRB reasoned that the *Sure-Tan* Court premised its decision on federal agency comity by which federal agencies should accomodate their directives to any congressional laws which might present a potential conflict. From the ALRB perspective, federal agency comity is irrelevant to state agencies enforcing state laws.[76] Applicable California law, ALRA section 1160.3, makes no distinction regarding the lawful immigration status of employees receiving backpay or reinstatement remedies.[77]

The ALRB also argued that its decision was not preempted by the INA's function of deterring illegal entry and presence in the United States, thereby invalidating the decision by reason of the supremacy clause.[78] The ALRB stated that preemption did not apply to its action in *Rigi* for three reasons. First, there is no express or implied legislative intent to occupy the field. The ALRA represents California's historic exercise of its police powers and the protection of its workers; the mere existence of the INA does not prevent the ALRB from issuing remedial orders, inasmuch as Congress has not expressly or impliedly reserved the regulation of the employment of undocumented workers through the INA.[79] Second, there is no actual conflict between state law — the ALRB remedial order — and federal law — the Immigration and Nationality Act. State law is preempted when it *actually* conflicts with federal law rather than when it *potentially* conflicts with it.[80] Finally, the ALRB ruling does not stand as an obstacle to immigration law. The ALRB notes that a major purpose of the INA is to prevent undocumented immigration. The Board can find only a speculative and indirect relation between its remedial orders and INS operations, which provides insufficient grounds upon which to anchor preemption.[81]

The ALRB dissent takes issue with this argument offered by the

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75. *Arizona Farmworkers'*, No. 1 CA-CIV 8199, slip op. at 14.
76. *Rigi*, 11 A.L.R.B. No. 27, slip op. at 7-8.
77. *Id.* at 11.
78. *Id.* at 12.
79. *Id.* at 15. This argument may be mooted by the passage of employer sanctions penalties in IRCA.
80. The ALRB stated, "Under federal law, employers are not prohibited from employing undocumented aliens, even those subject to a final order of deportation (FOD). Thus, an agricultural employer can comply with an ALRB order of reinstatement and backpay without violating the INA." *Id.* at 16.
81. *Id.* at 20-21.

majority, perceiving the Board's remedial orders as "a strong incentive for illegal reentry or continued illegal presence."[82] The dissent seeks a middle ground between the ALRB majority and the *Sure-Tan* Court's order to the NLRB. The dissent would hold the discriminatee as presumptively entitled to the Board's remedy. However, should the respondent be able to rebut that presumption and demonstrate that the discriminatee is subject to a final order of deportation, the discriminatee would be held to be ineligible for the awarded remedy, unless the discriminatee attained legal status to work in the United States prior to the compliance hearing.[83]

Effects of Immigration Reform

The enactment of employer sanctions would seemingly undermine the reinstatement remedy. How can an undocumented worker receive reinstatement once the law prohibits employers from knowingly hiring undocumented workers? Such sanctions would appear to render moot dicta rationalizing the reinstatement remedy for undocumented workers.[84] The federal courts would then be unable to

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82. *Id.* at 24 (Member James-Massengale, dissenting in part).

83. *Id.* at 26. The ALRB subsequently issued a show cause order, indicating the Board's intention to adopt the dissent's position. *See* Notice of Board's Intention to Revise Decision and Order to Show Cause, Rigi Agric. Servs., Inc., A.L.R.B. No. 27 (Sept. 4, 1986). The Board then rescinded its show cause order in light of the passage of IRCA. *See* Order Rescinding Order to Show Cause, 11 A.L.R.B. No. 27 (Dec. 15, 1986).

84. Each of the cases discussed relies upon the premise, now invalidated by the enactment of IRCA, that federal law does not make the hiring of undocumented workers unlawful.

Sure-Tan: "Since the employment relationship between an employer and an undocumented alien is hence not illegal under the INA, there is no reason to conclude that application of the NLRA to employment practices affecting such aliens would necessarily conflict with the terms of the INA." *Sure-Tan*, 467 U.S. at 893.

Bevles: "We hold that the arbitrator's award of reinstatement and backpay notwithstanding the immigration status of the employees neither violates a clearly defined public policy nor is in manifest disregard of the law." *Bevles*, 791 F.2d at 1392.

Felbro: There is no provision "in the INA making it unlawful for an employer to hire an alien who is present or working in the United States without appropriate authorization." *Felbro*, 795 F.2d at 719.

Arizona Farmworkers':

> [W]e must determine whether a court's order of reinstatement to illegal aliens stands as an obstacle to the accomplishment of [the INA's goal of deterring illegal immigration]. A state court order of reinstatement does not restrain or limit the ability of the Immigration and Naturalization System to deport illegal aliens. Although once reinstated an illegal alien worker may have a greater incentive to remain in the United States, an appropriate federal order of deportation is fully enforceable. Neither a state court order of reinstatement nor a federal order of deportation undermines the authority of the other. Thus, an order of reinstatement would have no more than "some purely speculative and indirect impact upon immigration." Such an impact is insufficient to invoke preemption.

Arizona Farmworkers', No. 1 CA-CIV 8199, slip. op. at 14.

Rigi:

> Regardless of whether the *Sure-Tan* decision is read broadly or narrowly, how-

state that federal law does not make it unlawful for employers to hire undocumented workers; state courts and boards could no longer maintain that employers would be able to comply with their orders without the employer also violating federal law.

The courts could, however, take note of the undocumented worker's original date of employment for the employer represented in the instant case. If the date is prior to November 6, 1986 (the date IRCA becomes effective), the court could hold that the express language of Congress to "grandfather" these undocumented workers as current employees provides a basis for any action as an employee under the NLRA. Reading the pertinent sections of IRCA together suggests an express language basis for voiding the applicability of employer sanctions to the employers of these workers, thereby removing an obstacle to the imposition of a reinstatement remedy.[85]

Even if reinstatement is eliminated as a remedy by the passage of employer sanctions, the backpay remedy could still be applied under the approach taken by post-*Sure-Tan* cases. Backpay could be justified because nothing in the committee report or in IRCA directly speaks to the issue of remedies for retaliatory discharges. Undocumented workers would be able to receive backpay for the period they were discriminatorily discharged. However, this issue still turns on how broadly the Supreme Court's "availability for work" language is construed.[86]

> ever, it is apparent to us that the conditions placed on reinstatement and backpay do not constitute applicable NLRA precedent under section 1148 of the [Agricultural Labor Relations] Act. The *Sure-Tan* Court's accomodation analysis was grounded in the case of *Southern S.S. Co. v. NLRB* the seminal case on federal agency comity. . . .
>
> The issue before us, however, is quite different. Any obligation on the part of the ALRB, a state agency enforcing a state statute, to restrict its remedies in order to accomodate the congressional objectives embodied in the INA or any other federal law raises principles of federalism which must be analyzed under an entirely separate set of precedent. As the *Sure-Tan* court noted, in another context, "federalism concerns are simply not at stake [in the *Sure-Tan* case]."

Rigi, 11 A.L.R.B. No. 27, slip op. at 7-8 (citations and footnote omitted).

85. IRCA § 101(a)(3)(B), 100 Stat. 3372 (describing inapplicability of INA § 274A(a)(2)). Specifically, that "Section 274A(a)(2) of the Immigration and Nationality Act shall not apply to the continuing employment of an alien who was hired before the date of the enactment of this Act." This section would void the application of (a)(2), employer sanctions: "(2) Continuing employment. — It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment."

86. *Sure-Tan*, 467 U.S. at 904.

IRCA is sensitive to farmer demands for an adequate supply of workers as well as abuses that have developed in reliance on an undocumented labor force in agriculture. The legalization of undocumented workers in agriculture is far broader than that offered for nonagricultural workers. Up to 350,000 undocumented farmworkers could obtain a one-year temporary legal status.[87] These workers would be able to convert their status to permanent resident status if they worked in agriculture for ninety days between April 30, 1985 and May 1, 1986; if they worked for ninety days in the preceding two years; and if they resided in the United States for an aggregate of six months during each of these years.[88] Should this group of workers turn out to be insufficient to meet agricultural demand, allowances are made for replenishment workers.[89]

Presumably, workers who are provided temporary legal status for work in agriculture would have the same employee protections as domestic workers because those protections would be part of the legalization effort. The Joint Explanatory Statement accompanying IRCA states that these workers should "be considered as United States workers."[90]

The number of undocumented workers who will remain in limbo should be proportionately smaller for those in farming than those in urban occupations. For undocumented workers in urban occupations, there is a four-and-one-half-year gap between legalization and enactment of the bill. For undocumented workers in farming, the failure to achieve legalization, by proving continuous presence prior to January 1, 1982, is supplemented by having worked in agriculture during 1985-86. Still, even the lax ninety-day employment in farming and six-month aggregate residency requirements may prove too narrow for many migrant farmers. It is unclear whether undocumented workers who fall outside this broad period for legalization would have remedies available to them. Because the NLRA does not cover agricultural workers, state statutes, such as the Agricultural Labor Relations Act in California and the Agricultural Employment Relations Act in Arizona, would be applicable.

Finally, IRCA may render moot older cases such as *Rigi* and *Arizona Farmworkers'*. The contested issue of whether such workers

87. IRCA § 302(a), 100 Stat. 3417 (amending/adding INA § 210(a)).
88. *Id.*
89. *Id.* § 303(a).
90. *Id.* § 303(a), 100 Stat. 3422-26 (amending/adding INA § 210A). H.R. CONF. REP. No. 1000, 99th Cong., 2nd Sess. 97 ("Conferees intend that individuals admitted under Section 302 [permanent residence for certain special agricultural workers] and 303 [admission of additional special agricultural workers] . . . as temporary or permanent resident aliens be considered as United States workers . . . ."

would be eligible for remedies, especially reinstatement, may no longer be applicable since the workers involved could well have temporary legal status as farmworkers. No final order of deportation would issue at this point. The retaliatory discharge in *Rigi* occurred on February 5, 1982,[91] and blacklisting and refusal to rehire in *Arizona Farmworkers'* occurred prior to December 26, 1984.[92]

RECOMMENDED REMEDIES

Three classifications of undocumented workers emerge out of IRCA. The courts will need to adopt different standards of review for each of these classes or categories to effectively implement IRCA, and at the same time, maintain the integrity of the NLRA's protections for all employees against retaliatory discharges. While the qualifying criteria differ for agricultural and nonagricultural workers, both groups contain the following three classes: 1) post-enactment workers — undocumented workers who arrive after the enactment of IRCA; 2) qualifying workers — undocumented workers who arrived within the qualifying period;[93] and 3) limbo (or grandfathered) workers — undocumented workers who arrived before the enactment of IRCA, but not within the qualifying period.[94]

An equitable application of remedies to these three classes of undocumented workers must be accomplished in a way that gives substantial consideration to protecting domestic workers from both an economic and violation-of-rights perspective. IRCA's solution to protecting the domestic worker through immigration reform achieves this objective by paying equal attention to undocumented workers and their employers: for the undocumented worker, IRCA increases physical deterrence at the border;[95] for the employer, IRCA imposes sanctions at the marketplace.[96] From an economic perspective, both actions protect the labor market for domestic workers. However, employers still must be deterred from intruding upon the labor rights available to all "employees" under the NLRA, by the ability to re-

91. Appellant's Brief at 4, Rigi Agric. Servs., Inc. v. California Agric. Labor Relations Bd., No. 85-2145 (9th Cir. October 30, 1985).

92. *Arizona Farmworkers'*, No. 1 CA-CIV 8199, slip op. at 1.

93. IRCA § 201(a), 100 Stat. 3394 (amending/adding INA § 245A); *id.* § 302(a), 100 Stat. 3417 (amending/adding INA § 210(a)).

94. *Id.* § 101(a)(3)(B), 100 Stat. 3372 (describing the nonapplicability of INA § 274A(a)(2)).

95. *Id.* § 111(a), 100 Stat. 3381.

96. *Id.* § 101(a), 100 Stat. 3360-68 (amending/adding INA § 274A).

taliate against undocumented "employees" who attempt to exercise their rights.

The three classes of workers created by IRCA calls for a tailoring of remedies and accompanying standards of review to achieve the appropriate effect of protecting domestic workers.

Post-enactment Workers

The full force of IRCA is directed at future undocumented entrants into the United States labor market. These workers should not have a reinstatement remedy since IRCA intends to preclude these workers from being hired by making their employment unlawful.[97] However, if employers do hire post-enactment workers, they should not be permitted to use the threat of a report to the INS to chill associational activity. For example, the *Sure-Tan* decision effectively gives such employers one free bite at the apple, permitting them to report these workers to the INS without being sanctioned on this occasion.[98] The cease-and-desist order addresses only repeated reports to the INS to thwart employees from availing themselves of their rights under the NLRA.[99]

IRCA calls for equal attention to both the employer and the undocumented worker; neither escapes its purview. Thus, the denial of the reinstatement remedy to the post-enactment worker should be juxtaposed with the imposition of backpay upon the employer for attempting to undermine the NLRA employee status. The payment of backpay by the employer can be construed in the same way as an extension of the employer sanctions penalty. Both serve the purpose of maintaining the integrity of the domestic labor market and the effective functioning of the NLRA.[100] Should the court balk at awarding the post-enactment worker backpay, the penalty can be deposited with the United States Treasury to be assigned for any number of purposes, such as defraying the costs of legalization. Further, the Government of Mexico has questioned the fairness of the United States in the treatment of its nationals.[101] Mexico's challenge affects each branch of the United States government. The award of backpay

97. *Id.*

98. *Sure-Tan*, 467 U.S. at 895-96, 904.

99. *Id.*

100. The NLRB would be unlikely to choose this course of action on its own since the Board "lacks authority to punish; its remedy must not be punitive in nature." 2 C. MORRIS, THE DEVELOPING LABOR LAW 1634 (C. Morris ed. 1983). The court may also adhere to the NLRA remedial objectives in this situation, refusing to impose a penalty on the employer. However, if the court approaches this situation from the perspective of IRCA and employer sanctions, it might be willing to adopt the proposed penalty. Alternatively, Congress may decide to enact this penalty as a necessary complement to employer sanctions.

101. *Discursos del Presidente de Mexico durante su visita a los Estados Unidos de America*, 34 EL MERCADO DE VALORES 806 (1986).

in this situation would demonstrate an even-handed approach to the implementation of IRCA. The court's adoption of this two-pronged remedy would also explicitly harmonize the NLRA with the INA in terms of the new immigration amendments.

Qualifying Workers

Undocumented workers who have been in the United States prior to January 1, 1982, or who have met the ninety-day agriculture requirement,[102] are eligible for legalization. These workers should be treated as United States workers. If they are subject to a retaliatory discharge, they should receive both the reinstatement and backpay remedies, as should any employee under the NLRA.

The court's standard of review should be an absolute application of NLRA remedies. The remedies should be conditioned only upon these individuals not being disqualified by nonwaivable grounds of exclusion[103] or upon their failure to pursue legalization. This standard would give individuals who have been legalized the same rights as legally available workers and would meet both narrow and broad readings of *Sure-Tan*.[104]

Limbo or Grandfathered Workers

This category of workers represents the most vulnerable group of undocumented persons. Their status is de facto lawful inasmuch as IRCA refers to the grandfathering of these workers — that is, they are not subject to the reporting requirements under employer sanctions.[105] However, should these workers be confronted by the INS, they would be deported. IRCA has not conferred lawful immigration status upon these workers.

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102. *See supra* text accompanying notes 87-88.

103. Exclusions of waivers include criminal offenses, likely to become a public charge, drug offenses (except for a minor charge of possession of marijuana), national security reasons, membership in certain organizations, and those who assisted in Nazi persecutions. Because undocumented workers often work at low-paying jobs, they may qualify as public charges because they may be eligible for public assistance supplements. To avoid this bizarre consequence, IRCA provides a special rule for determining whether an individual is a public charge: "an alien is not ineligible for adjustment of status under this section . . . if the alien demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance." IRCA § 201(a), 100 Stat. 3398 (amending/adding INA § 245A(d)(2)(B)(ii)).

104. For example, a broad reading of *Sure-Tan* might find that *no* undocumented workers are eligible for NLRA remedies, whether they are present in the United States or not; a narrow reading of *Sure-Tan* would exclude only those undocumented workers who no longer are present in the United States.

105. *See supra* note 85 and accompanying text.

Reasonably, the remedies available to this class of workers should be less than those available to qualifying workers, but more than those available to post-enactment workers. However, there is no middle ground unless the number of remedies to qualifying workers are increased. In the present analysis, grandfathered workers can be analogized more closely to post-enactment workers and given only the backpay remedy, or they can be analogized more closely to qualifying workers and given both the backpay and reinstatement remedies.

Since IRCA has conferred a de facto lawful employment status upon these grandfathered workers, the scales tip in favor of classifying them with qualifying workers for the purposes of applying the NLRA. Should these workers be the subject of a retaliatory discharge, their immigration status should not come to the notice of the INS. To do so through the NLRA process would defeat the grandfathering effect of IRCA as well as the intent of Congress as expressed in the committee report that employer sanctions not be "used to undermine or diminish in any way labor protections in existing law."[106] Furthermore, refusal to grant both remedies to these workers would create a chilling effect on the enforcement of the NLRA, for no undocumented worker would wish to call attention to his unlawful immigration status. It is precisely at this juncture that the violation-of-rights theory is most compelling — that domestic worker rights are undermined by the presence of a sub-class of workers who can be threatened by employers with impunity.

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106. *See supra* note 19 and accompanying text. Labor adjudicatory agencies, such as the NLRB and the ALRB, should consider evidence regarding an employee's immigration status as irrelevant to the dispute determination process. Such evidence in a concerted action hearing merely undermines the central issue: the determination of whether employee rights have been violated. The proposed model argues that the employer should not be permitted to make use of the employee's immigration status during a labor dispute hearing. Such a provision would be consistent with Congress' attempt to demagnetize the employer's attraction to undocumented workers. In effect, once the employer hires a worker, the employer should be estopped from using extraneous information to defeat an action that arises between the employer and the employee. The only time at which IRCA compels the employer to take notice of an employee's lawful immigration status is when the employer is hiring a new worker. Outside of this context, the employer should not be concerned with the employee's immigration status.

Once a finding is reached and a remedy is to be awarded, however, there must be some determination of the employee's immigration status to decide which category of the proposed model applies: Is the worker to be treated as a post-enactment worker? As a grandfathered worker in limbo? As a worker eligible for (or possessing) lawful immigration status? One approach that may lend itself to this inquiry is a procedure used in the Systematic Alien Verification for Entitlements (SAVE) project, described in the Immigration Control and Legalization Amendments Act of 1986, H.R. REP. No. 682, 99th Cong., 2d Sess. 67-68.

SAVE would provide the labor adjudicatory agency with INS data in order to sort all workers eligible for remedies (or even a more limited group who attest to being noncitizens or nationals) into one of the three categories, but prohibits the INS from using such inquiries for its own enforcement activities.

Although the remedies for the grandfathered workers would be the same as those for qualifying workers, the absence of a permanent foothold in the legalization process sets the two classes of workers apart. Congress could have obliterated the difference between these two categories by making legalization available to all workers present in the United States at the date of enactment, but it did not choose to do so. These workers are extended the umbrella of protections as employees under the NLRA, but they are not shielded from the rational application of INA regulations.

Thus, a threshold question is presented. The courts must first determine how the grandfathered worker has been administratively noticed. If the individual has been noticed through the NLRA process, deference should be given to NLRB regulations. In this instance, the undocumented worker in limbo would be shielded from INS deportation proceedings and treated only in the context of an unfair labor practice. However, if the individual has been noticed through some independent method by the INS (excluding reports from the employer), deference should be given to INS regulations. In this instance, by contrast, the undocumented worker in limbo would not be shielded from INS proceedings. The notice threshold reasonably allocates the rights and risks that characterize these undocumented workers in limbo.[107]

CONCLUSION

This Comment has proposed a model for deciding what remedies should be afforded to IRCA's three classes of undocumented workers in retaliatory discharge situations. The model is guided by the manner in which domestic workers can best be protected under the complementary operation of the NLRA and the INA. The model also suggests modifications to the *Sure-Tan* and post-*Sure-Tan* holdings in light of IRCA provisions, particularly employer sanctions and the presence of a class of undocumented workers in limbo. The following summarizes the proposed remedies for these three classes of workers:

107. An evidentiary problem arises if the employer does not directly report the undocumented worker to the INS, as occurred in *Sure-Tan*, but does so surreptiously. In order to deter employers from taking advantage of unlawful immigration status in a labor dispute, the courts could permit the trier of fact to form an inference, or alternatively, Congress could legislate the same outcome: during a concerted action, any report to the INS concerning the employees' immigration status should be considered as the employer's report, thereby triggering deference to the NLRB approach and excluding any INS action. Whether the worker is engaged in a labor rights issue can be determined objectively.

1) *Post-enactment or Future Undocumented Workers.* Undocumented workers who come to the United States after the enactment of IRCA should not be given reinstatement as a remedy since it is against the law for employers to knowingly hire undocumented persons after the law's enactment on November 6, 1986. However, these workers should be given backpay as a remedy. The employer's temptation to use undocumented workers would be diminished by ensuring that no benefit accrues to hiring these workers in preference to domestic workers. The chief deterrent mechanism in IRCA is *employer*, not *employee* sanctions. Thus, the courts should support the mechanism chosen by Congress to deter undocumented employment, namely, through the shaping of employer practices.

2) *Qualifying Workers.* Undocumented workers, who have been in an illegal status prior to January 1, 1982, are eligible for legalization. Barring any exclusionary factors, and assuming they pursue legalization, these workers should be analogized to legally available workers and provided with both reinstatement and backpay remedies in any retaliatory discharge situation.

3) *Limbo or Grandfathered Workers.* The workers who are most vulnerable to exploitation are undocumented workers in limbo. These workers are not eligible for legalization, and yet have a de facto legal status by being grandfathered out of employer reporting requirements under IRCA. Unless these workers choose to leave the United States on their own initiative, deportation would occur only if they are reported to the INS by the employer or if they come to the attention of the INS independent of employer reports. Employer reports to the INS have been singled out by the courts and by Congress as an abuse of the NLRA and as injurious to domestic worker rights. Should undocumented workers in limbo come to the attention of the court as a result of an employer's report while the workers are asserting protected labor rights, the court should provide both reinstatement and backpay remedies. In this way, the significance of the grandfather clause is preserved. However, should the undocumented worker come to the attention of the court independent of an employer's report, and hence outside the purview of the NLRA, the court should defer to INS procedures that affect all undocumented workers. Congress did not extend legalization to these workers, only toleration.

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